Office - Supreme Court, U. S.
FILED
APR 20 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 889

ESTATE OF R. A. SEWELL, JOSEPHINE M. SEWELL, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF

OLIVER C. HANCOCK,
CLIFFORD R. WHEELESS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 889

ESTATE OF R. A. SEWELL, JOSEPHINE M. SEWELL, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S REPLY BRIEF

To the Honorable the Chief Justices and the Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner in the above-stated petition for a writ of certiorari, and respectfully shows to this Honorable Court:

That, in the response and brief of the Respondent in opposition to the grant of said petition, there are vital errors of fact, which—though inadvertent—would, if left uncorrected, gravely prejudice the Petitioner's case, to wit: On *page 13* of such response and brief is the statement, "In view of the *facts set forth in the statement, supra,* there was more than sufficient *evidence* to sustain a finding that the taxpayer never intended to make a gift of the stock to his wife. • • • There was ample *evidence* from

which the Tax Court could conclude" in favor of the Respondent's contention as to a partnership. (Italics ours.) In this "Statement" (pp. 3-12), no purported " fact," adverse to the Petitioner, relied on by the Respondent, represents any "Evidence" in the record (pp. 102-197), and no page is cited from such "Evidence." But all of the alleged "facts" in the "Statement" are taken only from the findings and conclusions of the Tax Court Judge (pp. 34-78). This appears from every citation made in the rssponse (pp. 4-12). The correctness of all these adverse findings, as unauthorized by any substantial evidence, has been duly challenged by the Petitioner's Assignments of Error in this Court and in the Court of Appeals (Petition for Certiorari and Supporting Brief, pp. 3-13, 36; Petition for Review, R. 88-99). The correctness of the facts as stated there, and on pages 30-36 of the present Petition, with citations from the Record Evidence itself, has not been questioned.

On *page 3* of the response, it is stated: "This case arises from a *consolidated proceeding* before the Tax Court," from which separate petitions for review were taken, and a petition for certiorari by other Sewells was denied on February 25, 1946. For convenience, the evidence was taken at the same time, and the Tax Court Judge rendered a consolidated memorandum opinion and findings, but there was no legal consolidation. "Each of said cases was heard before the Tax Court separately;" and separate decisions were rendered (R. 103, 84). The facts as to dominion and control, including sales and pledges by Mrs. Sewell herself as donee after the alleged stock gifts, were wholly different; and in the other cases there were no issues as to partnership. Here, there was no sort of fact to indicate any express or implied condition attached to the gifts, or continued dominion by the donor over them, or contem-

poraneous or near-connected agreement as to any loan or use of proceeds. Such assertions as "*facts*" (instead of as contentions), in the Response, are negatived by the Record Evidence (Citations from Record, Petition for Certiorari and Brief, pages 31-36).

Among other erroneous statements of alleged "*facts*" both as to gift and as to partnership, on *page 4* of the Response, is the statement: "At the time of, or subsequent to the issuance of the certificate, she endorsed them (the stock certificates) in blank, some of the endorsements not having been made until the times when her shares were sold." Quotations from the Record to negative each erroneous statement by the Respondent we believe would be here out of place; but we feel compelled to do so as to any "endorsements," since such a statement—if correct—would render this only a "fact case," the decisions of the lower courts authorized by evidence, and this petition wholly lacking in merit.

The endorsements "were not made at the time (the accountant) prepared the new stock certificates." He "did not see her(the donee) indorse the certificates * * * didn't hand the certificates to her and ask her to indorse them" (R. 113, 123). The donee "didn't indorse these shares soon after they were transferred to (her); maybe one of them in the Fall following the gift * * * along about the time of the sale." She "sold them," and in 1936 she herself "entered into certain pledge contracts" with shares of the stock as security. "I (the donee) sold some of the stock myself; the other I pledged to borrow money on." The first sale by her was on December 29, 1934 (the gift on January 2, 1934); other sales by her in 1935, 1936, and 1937; and the written, recorded pledge contracts were executed by her on October 31 and December 18, 1936 (R. 155, 157; Doc. Ev., Exhs. 1, 2, 13, 22-26). Un-

der these supported, undisputed facts, with subsequent acts of the donee, the statement that "at the time of * * * the issuance of the certificates" (or subsequently) she "endorsed them" or some of them—with implications as to the donor's continued control—is inaccurate and does the Petitioner a grave injustice.

None of the facts in her petition and supporting brief, and none of the Reasons for Granting the Writ, there stated, have been challenged by the Respondent. The only reason urged for a denial, under the recent *Tower* and *Lusthaus* partnership decisions and inapplicable mere "fact" cases, is the erroneous or inaccurate (though inadvertent) statement, *as "facts,"* of matters which the Petitioner has challenged, and now again respectfully challenges, as wholly unsupported by the record.

WHEREFORE, the Petitioner respectfully moves that the above-stated vital errors of fact be corrected by the Respondent, or that such matters in the Respondent's "Statement" be not considered as *"facts"* in passing upon her petition.

O. C. HANCOCK,
CLIFFORD R. WHEELESS,
Counsel for Petitioner.